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Supreme Court of the United States

OCTOBER TERM, 1990

JAKE AYERS, JR., et al.,
Petitioners,

UNITED STATES OF AMERICA
Plaintiff-Intervenor,

v.

RAY MABUS, GOVERNOR,
STATE OF MISSISSIPPI, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF OF THE NATIONAL BAR ASSOCIATION AND THE NATIONAL ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION AS *AMICI CURIAE*

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QUESTION PRESENTED

Whether a State that has maintained a de jure system of segregation in publicly supported higher education remains under a continuing obligation to otherwise administer its university program in ways calculated to undo the injuries of its segregated past?

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CONSENT OF THE PARTIES

Petitioners and Respondent have consented to the filing of this petition.

INTEREST OF AMICI CURIAE

The National Bar Association (NBA) was founded in 1925, and is an organization comprised of 20,000

Black lawyers, many of whom are graduates of historically Black colleges and universities, across the United States. Since its founding, NBA has been involved in promoting civil rights activities in an effort to improve the educational, societal, and economic welfare of Black and other disadvantaged Americans. NBA, for almost seventy years, has actively participated in the formation of this nation's legislative and judicial policy affecting the educational advancement and opportunities of minority and disadvantaged youth and young adults of the nation.

The National Association for Equal Opportunity in Higher Education (NAFEO) was founded in 1969, and is an association comprised of the presidents of over one hundred historically Black public and private colleges and universities located in the United States. Collectively, these schools, many established prior to the Civil War and thereafter, have graduated hundreds of thousands of Black and white Americans and other minorities whose voices are also represented by NAFEO. NAFEO was established to advance the high aims of educating Black Americans who were denied an equal opportunity to obtain an education at the post-secondary level as a result of the vestiges of *de jure* and *de facto* segregation. NAFEO members are committed to the goal of educating students that attend its colleges and universities, and dedicated to provide financial and human resources necessary to achieving this goal. NAFEO has a unique interest in this litigation as, through its membership, its members, alumni, and faculty seek to promote the widest possible sensitivity to the complex factors involved and the institutional commitment required to create successful higher education opportunities for

students from groups exposed to the elements and vestiges of racism, exploitation, and neglect imposed by various states and by other mainstream economic, educational, and social institutions of this country.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case as presented by the Petitioners.

REASONS FOR GRANTING CERTIORARI

I. GRANT OF CERTIORARI IS NECESSARY TO RESOLVE A SPLIT IN DECISION ON A FEDERAL QUESTION IN THE JUDICIAL CIRCUITS

The federal judicial circuits are split as to the scope of a state's duty to eliminate the effects of past, *de jure* segregation in public universities. While the federal courts agree that the affirmative duty to dismantle a racially dual structure in the elementary and secondary levels apply also in the context of higher education,[1] they do not agree on the question of "whether the scope of the duty is as broad in the higher education context as has been defined and applied in the elementary and secondary context." *Compare Ayers v. Allain*, 674 F. Supp. 1523, 1552 (N.D.

[1] *See, e.g.*, United States v. State of Alabama, 628 F. Supp. 1137 (N.D. Ala. 1985), *overruled on other grounds*, 828 F.2d 1532 (11th Cir. 1987); Norris v. State Council of Higher Education, 327 F. Supp. 1368 (E.D. Va.) (three-judge panel), *aff'd sub nom.*, Board of Visitors of the College of William & Mary v. Norris, 404 U.S. 907 (1971); Lee v. Macon County Board of Education, 317 F. Supp. 103 (M.D. Ala. 1970) (three-judge panel), *aff'd in part*, 453 F.2d 524 (5th Cir. 1971); Alabama State Teachers Association (ASTA) v. Alabama Public School and College Authority, 289 F. Supp. 784 (M.D. Ala. 1968) (three-judge panel), *aff'd*, 393 U.S. 400 (1969).

Miss. 1987) (*Ayers I*) *and Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979).

At the elementary and secondary levels of public education, this Court has ruled that the scope of the duty to desegregate formerly *de jure* public schools includes the affirmative duty to eliminate all "vestiges" or effects of the former *de jure* segregated system. *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968). Amici believe that the facts embodied in the case *sub judice* presents a compelling need for determining the duty of a state in disestablishing a formerly *de jure*, dual system of higher education.

The Fifth Circuit maintains that "a state's affirmative duty is satisfied by the good faith adoption of race-neutral policies and procedures." *See Ayers I*, 674 F. Supp. at 1552 (*citing ASTA v. Alabama Public School and College Authority*). By contrast, the Sixth Circuit, relying on *Green*, maintains that "there is an affirmative duty imposed upon the state by the Fourteenth Amendment to the Constitution of the United States to dismantle [a] dual system of higher education," *Geier v. Alexander*, 801 F.2d 799, 800 (6th Cir. 1986), and that the "duty to remove all vestiges of state-imposed segregation" is the same as with elementary and secondary schools. *Id.* at 802.

The trial court in the case *sub judice* followed the decision of the Fifth Circuit, concluding that the scope of a state's duty to desegregate a formerly *de jure* public university system is to be narrowly defined. In short, the trial court concluded that race-neutral policies applied in good faith is not only the beginning, but the extent of the scope of a state's duty to desegregate public universities in the State of Missis-

sippi. *Ayers I*, 674 F. Supp. at 1553-54. Relying on *ASTA v. Alabama Public School and College Authority*, the trial court concluded that "a state's affirmative duty is satisfied by the good faith adoption of race-neutral policies and procedures." *Ayers I*, 674 F. Supp. at 1552. The trial court noted that the distinction articulated in the *ASTA* case was buttressed by this Court in *Bazemore v. Friday*, 478 U.S. 385 (1986). Therefore, the trial court read *ASTA* and *Bazemore* for the proposition that "the scope of the affirmative duty to disestablish a former *de jure* segregated system of education is to be defined in accordance with the degree of choice individuals enjoy as to whether they wish to attend college at all and, if so, which one." *Ayers I*, 674 F. Supp. at 1553.

The three-judge panel that reversed the trial court in the case *sub judice* followed the interpretation applied by *Geier v. Alexander*. *See Ayers v. Allain*, 893 F.2d 732 (5th Cir. 1990) (*Ayers II*). The *Geier* court held that a "state has an affirmative duty to eliminate all of the 'vestiges' or effects of *de jure* segregation, root and branch, in a universal setting." 801 F.2d at 804. In its opinion, the three-judge panel concluded that "[t]he searching inquiry demanded by *Geier* implies that the federalism and separation of powers concerns involved in finding a state actor liable under the equal protection clause will not prevent a federal court from demanding unitary status in a public university system." 893 F.2d at 744. An *en banc* panel of the Fifth Circuit set aside *Ayers II* based upon the district court's opinion. *Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990) (*Ayers III*).

II. THE COURT ERRED IN DETERMINING THAT THE INSTITUTION OF A RACE-NEUTRAL ADMISSIONS POLICY SATISFIES THE STATE'S DUTY TO ELIMINATE ALL VESTIGES OF PAST DISCRIMINATION IN PUBLICLY SUPPORTED HIGHER EDUCATION

The public university school system in the State of Mississippi consists of eight educational institutions, and several entities under the jurisdiction of the Board of Trustees of State Institutions of Higher Learning (hereinafter "Board of Trustees").[2] Prior to *Brown v. Board of Education*,[3] the Board of Trustees had instituted numerous segregative policies "encompassing 1) student enrollment, 2) the maintenance of branch centers by the historically white universities in close proximity to the historically black universities, 3) the employment of faculty and staff, 4) facility provision and conditions, 5) the allocation of financial resources, 6) academic program offerings, and 7) the racial composition of the Board and its staff." *Ayers II*, 893 F.2d at 734 (citing *Ayers I*, 674 F. Supp. at 1551). Amici agree with Petitioners that these segregative policies still exist in Mississippi, as Petitioners have described them in their petition.

Notwithstanding the Court's mandate that states take measures to desegregate their public educational institutions, the State of Mississippi maintained its dual system of higher education up until the spring of 1962, the vestiges of which remain.[4] When the

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[2] *See* Ayers I, 674 F. Supp. at 1525.

[3] 347 U.S. 483 (1954) (Brown I).

[4] The historically white universities are 1) the University of Mississippi, 2) Mississippi State University, 3) the University of Southern Mississippi, 4) Mississippi University for Women, and

Court rendered its decision in *Brown I*, Mississippi was constitutionally required to dismantle its dual system, and "eliminate all vestiges of its racially discriminatory educational system." *See Brown I*; *see also Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971). This ideal of ensuring the availability of educational opportunities for minorities at the college and university level was more recently recognized as an important and legitimate state interest in *Regents of the University of California v. Bakke*, 438 U.S. 265, 362 (1978).[5] Amici believe that, as enunciated in *Bakke*, state-imposed segregation has no place in the public university system and assert that a state that has historically practiced *de jure* segregation may not simply declare a race-neutral principle to avoid liability for its past deeds and lingering effects.

Notwithstanding the Court's mandate in *Brown*, the Mississippi public higher education system failed to

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5) Delta State University. The historically black universities are 1) Alcorn State University, 2) Jackson State University, and 3) Mississippi Valley State University.

[6] In *Bakke*, the Court held, as outlined by the Harvard Plan, that ethnic diversity could be considered as one of a number of factors taken into consideration in the university's admissions program. The Court recognized that "[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identifiable discrimination. [The] school desegregation cases [attest] to the importance of this state goal . . . " *Id.* at 307. As the Court further noted in *Bakke*, "[a]t least since *Green* . . . it has been clear that a public body which has itself been adjudged to have engaged in racial discrimination cannot bring itself into compliance with the Equal Protection Clause simply by ending its unlawful acts and adopting a neutral stand." *Id.* at 362.

comply with the desegregation ruling until 1962. *See Meredith v. Fair*, 305 F.2d 343 (5th Cir. 1962). In *Meredith*, the University of Mississippi was ordered by the Fifth Circuit to admit a Black transfer student, James Meredith. Meredith had been a student at Jackson State College (now "Jackson State University"). Meredith sought transfer to the University of Mississippi in January, 1961.[6] When the University of Mississippi denied his admission, Meredith filed suit in federal district court, which was dismissed. *Meredith v. Fair*, 199 F. Supp. 754 (S.D. Miss. 1961). On appeal, as noted in *Ayers II*, Judge Wisdom of the Fifth Circuit wrote:

> The efforts of the Board of Trustees [of the State Institutions of Higher Learning] and the officials of the University of Mississippi together with various state officials, including the Governor and the Lieutenant Governor of the state of Mississippi, and the Mississippi Legislature to impede and deter efforts to integrate the student body at the University of Mississippi during the 1961-62 school year are well documented.

Ayers II, 893 F.2d at 734 n.6 (citing *Meredith v. Fair*).

While the universities operating under Mississippi's public university school system claim to admit and educate undergraduate and graduate students of all racial and cultural backgrounds, the racial identification of these schools are as vividly apparent today as they were approximately thirty years ago, under

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[6] *See generally* J. Meredith, THREE YEARS IN MISSISSIPPI (1966).

the *de jure* system.[7] *Most importantly, however, is the fact that differences in funding and educational programs are also vividly apparent.* The Historically Black Colleges and Universities (hereinafter "HBCUs") since their inception have received less funding and consequently have had less substantive academic programs as compared to the more abundantly funded historically white institutions. This all too apparent disparity is a result of the differences in the purposes or "missions" that each of the schools are designated to fulfill by the Board of Trustees.[8]

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[7] Black enrollment in the undergraduate programs at the historically white institutions for the years 1985 - 1986 is as follows: Delta State University—17.59%; Mississippi State University—11.0%; Mississippi University for Women—18.0%; University of Mississippi—5.9%; and University of Southern Mississippi—14.24%. Black enrollment in the undergraduate programs at the HBCUs during the same time period is as follows: Alcorn State University—95.6%; Jackson State University—91.9%; and Mississippi Valley State University—99.3%.

Black enrollment in the graduate programs at the historically white institutions for 1985 - 86 is as follows: Delta State University—26.2%; Mississippi State University—8.0%; Mississippi University for Women—13.0%; University of Mississippi—7.5%; and University of Southern Mississippi—8.1%. Black enrollment in the graduate programs at the HBCUs during the same time period is as follows: Alcorn State University—96.0%; Jackson State University—59.0%; Mississippi Valley State University—96.7%. *See* Ayers II, 893 F.2d at 734-35.

[8] The basis for these differences was allegedly justified in 1981 when the Board took measures to define the role and scope of its public universities in a document entitled "Mission Statements." *See* Ayers I, 674 F. Supp. at 1539. The document classified each institution as either "comprehensive," "urban" or "regional." Such classifications are "based on the number and level of degree programs offered by the institution, the fields

The Board of Trustee's power in the case *sub judice* is indistinguishable in its purpose and intent from the local school board's power in the *Green* decision to maintain a segregated system.

As noted in *Ayers III*, the Sixth Circuit, on rehearing *en banc*, set aside a three-judge panel, *Ayers II*, and held that while the disparities between the

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in which degrees are granted, the extent to which an institution conducts and receives funding for research, and areas of public service responsibility." *Id.*

Three historically white universities were designated by the Board as "comprehensive" universities: Mississippi State University, the University of Mississippi, and the University of Southern Mississippi. The comprehensive designation implies "that these institutions offer[ ] the greater number and higher level of degree programs . . . [and] that each institution [is] expected to offer a number of programs on the doctoral level but not in the same disciplines. Leadership responsibilities in specific disciplines have been assigned to each comprehensive university in order to promote program quality and the efficient utilization of limited resources." *Id.*

The historically black university, Jackson State University, is the only institution designated by the Board as "urban." The urban designation defines the school's role as "one oriented toward service of the urban community, that is, the City of Jackson. Its mission is to instruct in research and public service with particular emphasis on the needs of the urban community in which it is located." *Id.* at 1539-40.

The remaining historically white universities, Mississippi University for Women and Delta State University, and the remaining historically black universities, Alcorn State University and Mississippi Valley State University have been designated as "regional" universities. *Id.* at 1540. The regional designation "signifies a more limited programmatic focus for these institutions, that is, each is expected to restrict course offerings to quality undergraduate instruction." *Id.*

HBCUs and the historically white institutions "largely follow the mission designations, and the mission designations to some degree follow the historical racial assignments . . . [T]his does not mean the plaintiff class is denied equal education opportunity or equal protection of law." *Ayers III*, 914 F.2d at 692.[9] The *en banc* court held that the Board of Trustees has "adopted good-faith, race neutral policies and procedures and have fulfilled or exceeded their duty to open Mississippi universities to all citizens regardless of race." *Id.* In doing so, the *en banc* court wholly rejects the Supreme Court's holding in *Green*, stating that in the context of public higher education, "[*Green*]

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[9] Wholly ignoring the significance of the blatant economic and educational disparities between the historically black and historically white institutions, the *en banc* court opines that "[i]f black citizens in Mississippi may choose among any of the eight universities in the state, it is no denial of their right to equal protection that certain institutions formerly segregated by law, continue to provide a more limited range of educational opportunities than other institutions in the state." Ayers III, 914 F.2d at 688-89. The *en banc* court fails to acknowledge the purpose and effect of the mission labels imposed by the Board of Trustees. While ostensibly placing a "neutral" label on each institution, these designations in reality serve to condone, to shield, to hide the state's discriminatory funding practices. As noted by the three-judge panel decision in *Ayers II*, the white comprehensive universities received the most funding and offered the most courses before the Board of Trustees implemented the designations in 1981. The designations, based on resources existing in 1981, were thus objective labels for past discriminatory practices. Perceptions of inferiority were perpetuated under the fiction of educational reasonableness. The heirarchy of the mission designations, with the three historically white institutions labeled comprehensive, reinforced the image of the white schools as the superior institutions in the state. *See Ayers II*, 893 F.2d at 753.

has no application to this wholly different milieu." *Ayers III*, 914 F.2d at 685 (*citing Bazemore*, 478 U.S. at 408). In failing to rely on the principles of *Green*, the court has prematurely conveyed to Mississippi school authorities that its present public higher education school system, notwithstanding its continued dual operation, is a sufficient showing that past discrimination on all levels has been eliminated. By its holding, the *en banc* court has taken the first step towards dismantling the HBCUs, colleges and universities which the state for years has purposefully maintained at underfunded levels, and that now have diminished power to survive as the state purports to wave the neutral principle flag.

The neutral principle methodology used in *Ayers III*, if allowed to stand, may close all of the public HBCUs in the nation. The reason is obvious. After *Ayers*, it may be determined by the political process that the Equal Protection Clause of the Fourteenth Amendment no longer commands that these schools be funded at adequate levels to draw white or Black students to their doors. The *en banc* court failed to account for this potential result. *Ayers III* holds that the State of Mississippi no longer excludes Blacks from any of its public colleges on account of race, hence, Black students may voluntarily attend the historically white colleges and universities in Mississippi, reducing or eliminating the constitutional obligation of the state to adequately fund the HBCU. Given the differences in admission standards, attendance and matriculation rates of Black students at the HBCUs as compared to the historically white colleges, the issue of how to educate Black students in the face of this possibility is crucial. Thus, how to deal with

displaced Black students, should the HBCUs be dismantled in the wake of *Ayers III*, is a matter that the *en banc* court failed to address, and is therefore a fatal flaw in the court's neutral principle analysis and raises extraordinary and critical public policy issues that cannot be left unaddressed.

III. THE PRINCIPLE OF "GOOD FAITH" SANCTIONS THE VESTIGES OF FORMER DE JURE SEGREGATED SCHOOL SYSTEMS AND AS A RESULT THREATENS THE FUTURE OF HISTORICALLY BLACK COLLEGES AND UNIVERSITIES WHICH IN THE PAST HAVE FARED POORLY IN STATE FUNDING AND OTHERWISE

The good faith neutral principle enunciated in *Ayers III* threatens to undermine the existence of HBCUs in the State of Mississippi and across the nation. The principle will serve as the catalyst for a surgical dismantling of HBCUs because the political body responsible for the vestiges of the formerly *de jure* segregated school systems now seeks to be grandfathered.

The good faith neutral principle methodology enunciated in *Ayers III* threatens the progress made by Blacks through education at HBCUs. From a very uncertain beginning a little over a century ago—despite many difficult and unique obstacles, including chronic poverty—private and public Black colleges have somehow managed to make a distinct, qualitative, basic and lasting contribution to the survival and progress of Blacks, and to the enrichment and strength of this nation.[10]

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[10] *See* Smith, Commissioner, Equal Employment Opportunity Commission, Remarks at Hampton Institute Spring Symposium on "The Unique Role of the Predominantly Black College in American Society" (Apr. 23, 1979).

If the past is prologue, the future for HBCUs in Mississippi is clear. While under *Ayers III* the State of Mississippi may claim to open its doors at historically white universities to all students, Amici believe that it is highly predictable that the state may further reduce its financial support to HBCUs while past discrimination remains uncorrected. It is documented that the State of Mississippi has vigorously resisted compliance with the *Brown* mandate, and emphatically has refused to fund HBCUs to account for the decades of underfunding, and has refused to eliminate vestiges of a former *de jure* segregated public university system. *See Ayers II*, 893 F.2d at 753. Thus, it is incredulous to intimate that a policy focusing on a "good faith, neutral admissions policy" will be an impetus for the State of Mississippi to do in the future what it has resisted doing in the past when legal and moral pressure was applied.

IV. THE NEED FOR THE PRESENT CONTINUATION OF HISTORICALLY BLACK COLLEGES AND UNIVERSITIES HAS BEEN AFFIRMED BY THE COURT AND THE EXECUTIVE BRANCH OF GOVERNMENT

HBCUs developed as a necessity and the only source of education for Black youth. A substantial number of Black students earned their baccalaureate degrees at HBCUs in the South because Blacks were denied admission to white and predominantly white schools.[11] Historically speaking, with inadequate financial support, often strong opposition from the local white population, and little concrete evidence that they could succeed, HBCUs assumed the primary responsibility

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[11] *See* R. Havighurst & B. Neugarten, SOCIETY AND EDUCATION 329 (4th Ed. 1975) (hereinafter SOCIETY AND EDUCATION).

for reducing illiteracy among Blacks and for training desperately needed lawyers, doctors, teachers, military officers, homemakers and other professionals. So, in the past and now, despite all types of handicaps, HBCUs ably set about performing the miracle of transforming a Black rural, illiterate, powerless, persecuted, former slave people into a predominantly urban, highly literate, proud people.[12]

Today, almost forty years after *Brown*, HBCUs are vital to the state, and the Black community in particular, in that they provide access to, and potential academic success for, students who may have been denied an opportunity for higher education elsewhere.[13] However, the *Ayers III* solution to desegregation—its neutral principle methodology—may eventually effect a closing of all HBCUs and eliminate the only opportunity for some white students who live near their doors and other American and foreign students to obtain higher education.

Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973), recognized the importance of HBCUs. In that case, the court acknowledged the "crucial need" for, and the "important role" of, HBCUs in higher education:

> A predicate for minority access to quality postgraduate programs is a viable, coordinated statewide higher education policy that takes into ac-

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[12] Smith, *Blacks and Education: "Don't Shout Too Soon"—An Annotated Bibliography*, 7 HARV. BLACK LTR. J. 99, 100 (1990).

[13] *See generally* K. Tollett, Black Institute Of Higher Education: Inadvertent Victims Or Necessary Sacrifices? (Reprint 1981).

> count the special problems of minority students of Black colleges . . . [T]hese Black institutions currently fulfill a crucial need that *will continue* to play an important role in Black higher education. . . .

480 F.2d at 1165 (emphasis added). As the court predicted, the need for HBCUs which developed out of necessity in the post-Reconstruction era and beyond still exists eighteen years after the *Adams* opinion was written. Over one hundred HBCUs educate a universe of students.

The Executive Branch of government has agreed with *Adams*. On several occasions, former President Ronald Reagan and President George Bush discussed the importance of funding and preserving HBCUs, and have issued orders and proclamations to ensure that the colleges are properly funded for the continued education of hundreds of thousands of American youth. The Reagan Administration showed the seriousness of its commitment by saving one such HCBU from bankruptcy.[14] Similarly, on April 28, 1989, soon after he became President of the United States, President George Bush appointed a Board of Advisors on HBCUs and signed Executive Order Number 12677 which mandated economic parity for these schools and encouraged private economic support. He explained the nation's interest in maintaining HBCUs:

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[14] Remarks and a Question-and-Answer Session with Area Junior High School Students, 24 Weekly Comp. Pres. Doc. 1493 (Nov. 21, 1988). Presidents Reagan and Bush also declared a National Historically Black Colleges Week. *See, e.g.*, Proclamation 6019-National Historically Black Colleges Week, 1989, 25 Weekly Comp. Pres. Doc. 1365-66 (Sept. 18, 1989).

> For over 100 years, the [historically black colleges] have been a special part of our heritage. At a time when many schools barred their doors to Black Americans, these colleges offered the best, and often the only, opportunity for a higher education. And today, thank heavens, most of those barriers have been brought down by law. And yet, historically black colleges still represent a vital component of American higher education . . . .[15]

Speaking at a commencement ceremony one month later, President Bush noted that Alcorn State University, an HBCU in Mississippi, was a vital component to quality public higher education in this nation.[16]

Clearly the *en banc* panel's decision in *Ayers III* was decided wrongly as a matter of law, and as a matter of public policy. The decision is blind to the operative confluent constitutional dimensions of the Fourteenth Amendment, and impact on the robust

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[15] Remarks on Signing the Executive Order on Historically Black Colleges and Universities, 25 Weekly Comp. Pres. Doc. 633 (May 1, 1989); *see also* Executive Order No. 12677, 54 Fed. Reg. 18869 (1989). President Reagan signed a similar mandate on September 15, 1981 and declared: "Let us recognize that America's historic Black college is a 'terrible thing to waste.' And we're not going to allow it to be wasted." Remarks at a White House Luncheon for Officials of Black Colleges and Universities, 17 Weekly Comp. Pres. Doc. 978-80, 983 (Sept. 21, 1981); *see also* Executive Order No. 12320, 48 Fed. Reg. 46107 (1981) (President Reagan).

[16] Remarks at the Alcorn State University Commencement Ceremony in Lorman, Mississippi, 25 Weekly Comp. Pres. Doc. 703-06 (May 22, 1989).

and diverse exchange of ideas and culture that the HBCUs contribute to the nation through the statements and discourse of its accomplished graduates and student body, which is attached to a "countervailing constitutional interest" in the First Amendment.[17] *See Bakke*, 438 U.S. at 313. In addition, public statements and proclamations by Presidents of the United States, and the statements and majoritarian initiatives of the United States Congress demonstrate the public interest in protecting the HBCUs. The *Ayers* decision, if allowed to stand, may result in the closing of HBCUs because long-time opponents of educating a segment of the population of the United States may find that the Equal Protection Clause of the Fourteenth Amendment no longer commands that these institutions of higher learning be funded at adequate levels to draw white and Black students to their doors. This obvious observation will result in the effectuation of the "bypass theory," that is, Black and white students will "bypass" HBCUs due to the fact that HBCUs have been substantially underfunded for years by the political process of the states. Clearly the resulting "inequality of facilities, lack of academic programs, etc." are being sanctioned by judicial activism under the guise of a so-called good faith, neutral principle methodology.

Amici submit that this judicial activism, clothed as

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[17] As Justice Powell raised in *Bakke*, as universities benefit from the "right to select those students who will contribute the most to the 'robust exchange of ideas' [embodied in the First Amendment,] [i]n this light, [universities] must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission." 438 U.S. at 313.

a "good faith, neutral principle" inappropriately shifts the responsibility of equality from the State of Mississippi, which denied such equality, by enactment of laws and impermissible conduct, to its innocent Black and historically disadvantaged victims.[18]

The so-called good faith neutral principle methodology trammels on the First Amendment freedom of the students who attend HBCUs, the faculty who teach there, and the exceptional heritage of their alumni. The so-called good faith, neutral principle methodology will chill, if not eliminate, the broad diversity of speech which continues to emanate from historically disadvantaged students who attend HBCUs. The so-called good faith neutral principle methodology also interferes with the commerce of the nation created by Black and other historically disadvantaged students who travel across the United States to attend these schools, and in doing so, directly impacts upon the commerce of the nation.

The state should not receive a pardon from its past discriminatory conduct using neutral principles until

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[18] As one scholar has noted: "It is a serious question of social policy and or morality when such schools are called an achronisms. These schools supported a grave social responsibility for the nation. It is of dubious morality for those who could have made different decisions in the past about allocating adequate resources to these schools to raise the issue of their survival. The morality of the treatment of these schools needs to be raised more often." Blake, *Future Leadership Roles for Predominantly Black Colleges and Universities in American Higher Education*, 100 DAEDALUS: J. AM. ACADEMY OF ARTS AND SCI. 745, 747 (Summer 1971). *See also, Ayers II*, 893 F.2d at 753; Brief for Appellant at 26, *Ayers II* (No. 88-4103) (Testimony of Dr. Larry Leslie).

the vestiges of such discrimination have been eliminated.

Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari filed by the Petitioners in this case should be granted.

Respectfully submitted,

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